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No. 87-1252

IN THE

Supreme Court of the United States

October Term, 1987

H.J. Inc., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. WEST, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

PETITIONERS' RESPONSE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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RESTATEMENT OF THE CASE

Petitioners must reply to a number of Respondents' arguments contained in their Brief in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, hereinafter referred to as Response Brief. Respondents allege on page 11 that "fairly read, Petitioners' First Amended Complaint contended that Northwestern Bell participated in a single criminal scheme comprised of multiple acts of bribery for a common objective, resulting in Petitioners' claimed injury." It is true that the Eighth Circuit affirmed the district court, and following Eighth Circuit precedent, found that Petitioners' complaint alleged a series of fraudulent acts which were committed in furtherance of a single scheme and that that scheme was to influence Minnesota Public Utilities Commissioners. *H. J. Inc. v. Northwestern Bell Telephone Company*, 829 F.2d 648, 650 (8th Cir. 1987). However, this Court should be aware that the Minnesota courts have already broken Respondent's activity into separate schemes.

In *Matter of Minnesota Public Utilities Commission*, 417 N.W.2d 274 (Minn. App. 1987), the Minnesota Court of Appeals considered an appeal where the Minnesota Public Utilities Commission took new action regarding a 1984 Northwestern Bell rate order. In *Matter of Minnesota Public Utilities Commission*, the Minnesota Public Utilities Commission determined that the number and timing of ex parte contacts between Northwestern Bell and the Commissioners sustained an inference that Northwestern Bell's actions were intended to influence the commission's decision regarding the specific 1984 rate increase. In other words, it was a scheme in and of itself. This 1984 rate order is one of the rates alleged by Petitioners to have been affected by an individual scheme

of bribery. Specifically the 1984 rate-bribery scheme involved the actions alleged in paragraph 37 of Petitioners' Complaint. Other acts of bribery alleged in Petitioners' Complaint constituted separate schemes involving different actors, aimed at other rates.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve the conflict in the circuits regarding the RICO "pattern requirement."

Respondent's acknowledge that the interpretation of "pattern" has not been uniform by the district and circuit courts. See Response Brief, page 12. Respondents however argue that this Court in *Sedima, S.P.R.L. v. Imrex Company*, 473 U.S. 479, 500 (1985) challenged "Congress and the courts to develop a meaningful concept of 'pattern'." Respondents argue that the courts of appeals are continuing to develop this pattern requirement and that intervention by this Court at this time is unwarranted. Response Brief, p. 17.

It may be true that the lower courts should develop a "meaningful" concept of pattern. However, in *Sedima*, this Court specifically noted in 1985 that both Congress and the courts had failed to do so. In the last three years, Congress has continued in its failure to clarify "pattern." The circuit courts have developed at least three approaches to interpreting the RICO pattern requirement. See Petitioners' Brief, pages 8-11 for discussion of these approaches. In developing these approaches, the courts have shown a lack of ability to develop a "meaningful" interpretation. Surely, an element of any "meaningful" interpretation would be some consistency in approaches to this requirement. However the circuits have shown a total lack of consistency, the result of which is to

place differing burdens on RICO plaintiffs depending on the circuit in which the case is brought. This is most distressing in light of the fact that these different burdens also apply to criminal defendants brought into court under the RICO statute. Clearly these different interpretations raise constitutional questions regarding unequal treatment when applied to criminal defendants. The development of the interpretation of the pattern requirement by the circuit courts has not been "meaningful" and this Court should intervene and provide some direction in its interpretation.

Respondents also suggest that if greater uniformity under RICO is to be achieved, it should be accomplished by Congress. Response Brief, p. 17. However, Congress has had ample opportunity to address this issue and has not done so, leaving litigants in different circuits unable to devine the meaning of pattern. This Court has graciously allowed Congress three years to act; that failure to act further illustrates the necessity for interpretation by this Court.

Respondents also allege that the Eighth Circuit approach to the RICO pattern requirement is consistent with the statutory language as interpreted by this Court in *Sedima*. Response Brief, p. 15. However, nothing in the statute requires that there be a multiple scheme or multiple episode test for the showing of a pattern. The Eighth Circuit's interpretation is not consistent with the RICO statutory language. This has been acknowledged even within the Eighth Circuit. Judge John R. Gibson has specifically stated "that the multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO." *H. J. Inc. v. Northwestern Bell*, 829 F.2d 648, 651 (8th Cir. 1987) (Gibson, J. concurring). Other courts have noted that this requirement is not in keeping with the RICO statutory language:

> It should also be noted that the section 1961(5) definition of pattern requires at least two acts of racketeering activity, not two schemes. "Racketeering activity" is in turn defined as various statutory violations in section 1961(1), which has no language requiring a scheme. *See* 18 U.S.C. § 1961(1) (1982). Clearly then, the multiple scheme requirement is not grounded in the statutory language of RICO.

United States v. Ianniello, 808 F.2d 184, 192 n. 16 (2nd Cir. 1986). *Accord, Sun Savings and Loan Association v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987) ("neither RICO's language nor *Sedima's* interpretation of it supports a requirement of substantive unconnectedness, i.e., separate episodes or schemes."); *Lawaetz v. Bank of Nova Scotia*, 653 F.Supp. 1278, 1286 (D. Virgin Islands 1987) ("RICO's language and legislative history are devoid of a multiple episode requirement.").

A "multiple scheme" requirement for a showing of the pattern also conflicts with other portions of the RICO statute. This conflict is specifically found if the single scheme limitation of the Eighth Circuit is applied to § 1962(b), which deals with the takeover of an enterprise (a § 1962(b) count was pleaded in the instant case). The specific provision represents the principle purpose of the RICO statute. See *Russello v. United States*, 464 U.S. 16, 28 (1983); *United States v. Turkette*, 452 U.S. 576, 591 (1981). Under the Eighth Circuit's test, no racketeering activity would be found where the acts were pursuant to a single scheme. Section 1962(b) would effectively be read out of the statute:

> This provision does not prohibit an enterprise which is committing predicate acts; rather it prohibits predicate acts which are aimed at taking over an enterprise . . .

> It prohibits one scheme to acquire an interest in an interstate enterprise. To require two schemes as part of the *definition* of pattern under § 1961(5) would effectively eliminate this provision.

Ianniello, 808 F.2d at 192 (footnote omitted).

Similarly, requiring a multiple scheme to create a pattern of racketeering activity potentially conflicts with § 1962(d) which is the conspiracy section of the RICO statute (also pleaded in the instant case). A requirement of multiple schemes might defeat a single conspiracy charge and conversely, a showing of a single conspiracy may well preclude a finding of multiple schemes and thus a pattern. Such results would be untennable and clearly not within the contemplation of Congress. This is especially true in applying the RICO statute to criminal defendants.

II. This case is an appropriate vehicle to resolve the conflict that exists among the circuits regarding the RICO pattern requirement.

Respondents argue that even if this Court were desireous of reconciling the conflict among the circuits regarding the pattern requirement, this case would be an inappropriate vehicle to do so. Respondents allege that even with the interpretation of pattern which appellants urge the district court to apply that petitioners would not have stated a claim for relief upon which RICO could be granted. Response Brief, pp. 17-20. However, the Eighth Circuit in affirming the district court decision did not consider interpretations of the pattern statute by other circuits. Rather, the court considered whether the pattern requirement was met specifically only under the Eighth Circuit's interpretation. See *H. J. Inc. v. Northwestern Bell*, 829 F.2d 648 (8th Cir. 1987). It is clear in reviewing interpretations from other circuits that Petitioners' complaint would be upheld under other interpretations. See Petitioners' Brief, pages 15-17. Furthermore, the district court noted in its November 21, 1986 opinion that other circuits apply different interpretations of the pattern requirement. The court, after discussing other courts' interpretations, noted "were the Court writing on a clean slate, these cases might well be persuasive." Petitioners' Brief Appendix A-38.

Respondents also advance the *Keogh* and filed rate doctrines as additional reasons why this Court should not grant certiorari in the instant case; that is, Respondents allege that Petitioners' case would fail on these separate grounds. Response Brief, p. 21. Petitioners wish to point out, however, that this issue was not addressed by the Eighth Circuit, and therefore is not before this Court. However, even more importantly, Respondents themselves have admitted that there is a serious question as to whether the principles contained in *Keogh* could ever apply to situations involving State regulatory commissions. In Respondents' Brief and Appendix submitted to the State of Minnesota Court of Appeals in the companion case, *H. J. Inc. v. Northwestern Bell Corporation*, File No. CX-87-1843, p. 23, Respondents cite *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922) and *Square D Co. v. Niagra Frontier Tariff Bureau*, 476 U.S. 409 (1986) not to "argue that they bind this Court, but only to demonstrate that other courts have rejected Appellants' argument that regulatory rate decisions are not entitled to finality. . . ." The constitutional issues contained in a Federal court's unwillingness to examine the decisions of a commission operating under one of the other branches of the Federal Govern-

ment simply are not present in the instant case. Furthermore, Petitioners are not asking this Court to reopen the rates and examine the evidence—Petitioners are alleging that the commission itself was bribed—therefore rendering any decision from that commission a nullity. It is no different than if a decision of a trial court were tainted by bribery. Under Respondents' arguments, Petitioners could not collaterally attack that trial court's decision when the bribery was ultimately discovered. Such a result would be outrageous.

Finally, Respondents allege that the district court found that Petitioners' claim under 18 U.S.C. § 1962(a) was fatally defective because of the identity of "person" and "enterprise". Response Brief, p. 21. This is but one of the numerous RICO claims alleged by Petitioners; the other counts had no connection to 18 U.S.C. § 1962(a).

CONCLUSION

The third year anniversary of the *Sedima* decision is rapidly approaching. In *Sedima*, this Court noted that it is for Congress to limit the civil actions being brought under the RICO statute if it so chose. 473 U.S. 479 at 500. Congress has chosen to make no changes in the RICO statute. This Court also noted the courts had failed to "develop a meaningful concept of 'pattern'." *Id.* The courts are in disarray and in the three years since *Sedima* have still been unable to develop a meaningful concept of pattern. It is time for this Court to provide guidance. Petitioners therefore respectfully request that this Court provide guidelines in interpreting the RICO pattern requirement.

Dated: March 11, 1988.

Respectfully submitted,

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